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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 1082

IN THE MATTER OF MASTER TIME COMPANY, LTD. a Virgin Islands Corporation, *Petitioner,*

v.

THE HONORABLE PERCY DEJONGH, ETC., *Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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**PETITIONS FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ENTERED IN THE CASE ON SEPTEMBER 29, 1967**

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## OPINIONS BELOW

The memorandum opinion of the District Court of the Virgin Islands in this case (App. A at pp. 1a-2a) (unreported) refers to previous opinions in related cases brought by Virgo Corporation against the Government of the Virgin Islands the first of March 14,

1966 (App. C at pp. 4a-15a), and the second of June 2, 1966 (App. D at pp. 16a-34a) *Virgo Corporation* v. *Ralph M. Paiewonsky,* 254 F. Suppl. 405 (1966). The citation of the Court of Appeals Opinion (App. E at pp. 35a-63a) is not as yet available to Petitioner.

## JURISDICTION

The judgment of the Court of Appeals was entered on September 29, 1967. A timely petition for rehearing was filed on October 23, 1967 and was denied on November 7, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

## QUESTIONS PRESENTED

Whether the legislative powers of the Virgin Islands as limited by § 36 of the 1936 Organic Act, providing that no new export duties shall be levied except by the Congress, and the 1954 Organic Act extending the legislative powers of the Virgin Islands to all rightful subjects of legislation permit the passage of a discriminatory tax designed to limit the export of locally manufactured goods to the United States.

## STATUTES INVOLVED

Act of Congress dated June 22, 1936, PL 749, Ch. 699 § 36, 49 Stat. 1816, the pertinent portion of which is set out in full in Appendix H at p. 66a.

Act of Congress dated July 22, 1954, PL 558, Ch. 558, 68 Stat. 497, the pertinent portion of which is set out in full in Appendix L at pp. 92a-94a.

Act of Congress dated August 28, 1958, PL 85-851, 72 Stat. 1094, which is set out in full in Appendix I at pp. 67a-69a.

Act No. 1631 Sixth Legislature of the Virgin Islands of the United States 1966. Session Laws of the Virgin Islands 1966 p. 98, which is set out in full in Appendix K at pp. 76a-81a.

Act No. 1518 of the Sixth Legislature of the Virgin Islands of the United States 1965. Session Laws of the Virgin Islands 1965, Part 1, page 470, which is set out in full in Appendix J at pp. 70a-75a.

## STATEMENT OF THE CASE

Favorable tariff treatment of goods manufactured in the Virgin Islands has resulted in the establishment of a number of Watch Factories there. More than 97% of such production is exported to the United States customs area.

On May 3, 1965, the Governor of the Virgin Islands appointed a special committee to study problems relating to the growth of this industry and to recommend legislation. The committee, on August 9, 1965, recommended the establishment of a quota system and a tax of $2.50 on each unit in excess of the quota. $2.50 is equivalent to the duty paid by foreign manufacturers on popular-sized watches. On August 25, 1965, the Legislature of the Virgin Islands enacted Act No. 1518 which was approved by the Governor. The Act authorized the Governor to set up quotas for the various manufacturers and impose a tax of $2.50 per watch allowing a credit of $2.47 for watches sold to U. S. Customers in accordance with the quota or sold outside of the U. S. Customs area. There appears to be no dispute that the purpose of the Act intended by the Legislature was to limit shipments to the United States.

The petitioner instituted suit to have the act declared void on the grounds that the Government of the Virgin

Islands had no power to levy export duties. The District Court of the Virgin Islands, on motion for summary judgment held in favor of Petitioner on March 16, 1966.

On the day the Judgment of the District Court was entered the Legislature passed Act No. 1631 which modified the previous Act by classifying the tax as a production tax of $2.47 for all watches produced in excess of such quota.

Petitioner challenged the new law and on June 21, 1966, Judgment was once more entered for Petitioner and the District Courts decision was appealed to the Third Circuit Court of Appeals which held that the tax was a production tax and not an export duty, and that the 1954 Organic Act had as a matter of statutory construction repealed the provision of § 36 of the 1936 Act limiting the right to levy export duties. It ordered the case remanded with instructions to dismiss the complaint.

This is one of two cases having substantially similar facts decided at the same time by the Third Circuit.

## REASONS FOR GRANTING THE WRIT

### I. The Circuit Court Erred in Finding Act No. 1631 Was a Local Production Tax and Not an Export Duty.

The Court in finding that "the controlling fact is that the taxes attached while the watches were in process of their manufacture and before their sale and possible export" has ignored the fact that Section (a) of Act 1631 provides that the tax shall be imposed when the goods are sold or *removed* for sale, consumption or use. The word "removed" standing alone and unexplained would in its normal use mean removed from the Virgin Islands, or export.

Despite this clear language the Circuit Court found such tax an excise tax levied upon the production of watches in the Virgin Islands rather than a tax on goods entering commerce. It used as an example *Canton Railroad Co.* v. *Rogan,* 340 U.S. 511, 71 S.Ct. 447 (1951), which permitted the nondiscriminatory taxation of gross receipts of a company supplying Port services performed wholly within a state but whose business related to goods intended for export. It did not explain *A. G. Spaulding Bros.* v. *Edwards,* 262 U.S. 66; 43 S.Ct. 485 (1923), and *Richfield Oil Corp.* v. *State Board of Equalization,* 329 U.S. 69; 67 S.Ct. 156 (1946), which clearly refer to the goods themselves holding that such sale or removal is a portion of the export process. In the *Spaulding* case it was held that the sale of the goods is the act that commits the goods for export and that their removal to the ship is clearly export.

Thus the Government of the Virgin Islands affixes its tax at the very point where the goods enter the export trade and the Circuit Court in finding otherwise is interpreting a statute contrary to the precedents of this Court.

The fact that the Virgin Islands tax discriminates against goods intended for the U. S. market by imposing an additional $2.47 tax on those goods entering the stream of commerce in excess of the quota further illustrates the intention of the local legislature not to tax "*manufacture*" but to tax and limit "*commerce*" in such goods.

In § 3(a) the Act provides that in setting up the quota allotment, the Governor shall determine after due investigation the total annual consumption of

watches of all kinds within the Customs Area of the United States, and shall allocate among manufacturers of watches in the Virgin Islands 1/9 of such annual consumption.

§ 6 provides that the Governor in the apportionment of quotas may take into account the production of watches and other timing devices by the same company or affiliates in any other territory or possession of the United States.

These Sections reinforced by the Amendment of Act 1518 by Act 1631 in an attempt to change the tax from an export duty to a production tax amply demonstrate the clear purpose of the legislature.

This purpose is recognized in the Opinion of the Circuit Court:

> "It is certainly true that the legislature had this possibility in mind in enacting the statute. The record is abundantly clear as to this."
>
> (Opinion Maris J. p. 19)

There is therefore no dispute that the clear and announced intention of the legislature is to restrict exports to the United States. Throughout the entire record including the Opinion of the Circuit Court no other purpose is even suggested.

By applying an almost confiscatory increase in the tax rate to the watches at the time that they would enter the stream of commerce, the Virgin Islands Legislature did not intend to achieve a local tax result, such as raising revenue. To the contrary, by the very increase in the rate, it has made further trade in the product manifestly unprofitable. Even if the tax could be called an "excise tax", the amount of the discrimina-

tory increase (from 3¢ to $2.47) and the circumstances and history of its imposition show that it is intended as a measure to discourage or bar exports and commerce beyond an alloted amount.

**II. The Circuit Court Acted Contrary to the Holdings of the Supreme Court in Decreeing That It Had No Authority to Consider the Substance Rather Than the Form of a Territorial Taxing Scheme.**

Virtually all watches manufactured in the Virgin Islands are sold for delivery in the United States. The approximate U.S. duty on a foreign-made watch is $2.50 but watches manufactured in the Virgin Islands enter duty free. There is no quarrel with the right or power of the Virgin Islands Legislature to levy a production tax on watches and a 3¢ tax applicable to all watches would undoubtedly be considered such a tax, but a graduated tax moving immediately to $2.47 can only be considered such a tax if the Court closes its eyes completely to all of the surrounding facts and circumstances and relies entirely upon form rather than substance.

The Legislative history of the Act is so obviously directed to this end that the resulting limitation of commerce is not incidental to the taxing power but is the only direct, calculated, announced and accomplished purpose of the Act. To ignore this fact is to abandon completely the historic principles of judicial review of legislative actions. By whatever name it is called the tax here imposed is intended to and does unreasonably limit commerce between the territory and the United States.

This Court has announced its position in *American Oil Company* v. *Neill*, 380 U.S. 451, 85 S. Ct. 1130

(1965), "that when passing on the constitutionality of a state taxing scheme it is firmly established that this Court concerns itself with the practical operation of the tax, that is, substance, rather than form.

In *Connecticut General Life Ins. Co.* v. *Johnson,* 303 U.S. 77, 58 S. Ct. 436 (1938), this Court in interpreting the 14th Amendment denied a state the power to tax an economic benefit outside the state even though it had granted the subject corporation powers within the state. In the instant case the Virgin Islands Legislature seized upon the element of manufacture within its boundaries as a lever to limit by taxation the number of watches any manufacturer and its affiliates in other territories could ship to the United States. "In whatever language a statute may be framed its purpose must be determined by its natural and reasonable effect". *Henderson* v. *Mayor of New York,* 92 U.S. 259, 268, 23 L. Ed. 543; *Lawrence* v. *State Tax Commission,* 286 U.S. 276; 52 S. Ct. 556, 557; *State of Wisconsin* v. *J. C. Penney Co.,* 311 U.S. 435, 443, 61 S. Ct. 246.

Such illegal action could not be made legal simply because it called the tax a production tax rather than an export duty.

**III. The Decision of the Circuit Court Is Contrary to the Ruling of This Court in Granville-Smith v. Granville-Smith.**

In *Granville-Smith* v. *Granville-Smith,* 349 U.S. 1, 75 S. Ct. 553 (1955), both majority and minority opinions of this Court recognized the intention of Congress to permit the legislature to act upon matters of purely local concern and the rule of "rightful subjects of legislation" was applied by the majority and recognized by the minority. The very use of the word

"rightful" indicates that judicial determination may be necessary.

The Circuit Court refused to apply this principle and decided the case on a narrow definition of whether the tax was or was not an excise tax rather than taking the broader and proper position that it is the subject matter of the legislation rather than the type of tax which should be considered by a reviewing Court. In Acts 1518 and 1631 the Virgin Islands Legislature sought to limit commerce between the territory and the various states of the United States, a matter of greater scope than the limitations upon the judiciary prescribed by the divorce statute involved in the *Granville-Smith* case.

The Court also erred in finding that the specific prohibition of Section 36 of the 1936 Organic Act against the levying of export duties had been repealed even though the same Congressional Committee Reports cited by the Court show a careful consideration of the limitations of such Section.

Judge Albert B. Maris, the writer of the Court's Opinion below, called attention to the Congressional Committee drafting the 1954 Organic Act to what he referred to as "an inadvertent omission" of a Section 37 repealing the 1936 Organic Act referring to confusion caused by such omission. Despite this letter Congress chose not to repeal the 1936 Act, this can hardly be called "inadvertence" a second time. Nor does it appear that Congress has considered the 1936 Act repealed, for the Virgin Islands Customs are still administered by the Treasury Department under authority of the same Section 36.

The 1954 Revised Organic Act as amended, must be held to repeal all inconsistent prior acts. An important question before the Court is whether the limitation on the power to impose new export duties is inconsistent with the legislative power granted in the Organic Act. This Act, amended subsequent to the *Granville-Smith* case, provides at 48 U.S.C. § 1574, that such power extends to "all rightful subjects of legislation not inconsistent with this Chapter . . ." The two important questions of whether Congress considered the imposition of export duties to be one of the limitations imposed by the Chapter and whether legislation affecting exports is a rightful subject of legislation remain unresolved and it is submitted that the Court below erred in answering both of them.

The Circuit Court should not have decided that a general legislative power repealed a previous specific limitation on that power.

Should it be that the legislature of the Virgin Islands may now impose export duties, the fact remains that it may do so only with respect to *"rightful subjects"* of legislation. The avowed purpose of this legislation is the control of commerce. Is this a rightful subject of territorial legislation?

The Constitution of the United States provides at Article I, § 8, no tax or duty may be laid on articles exported from any state. This is a limitation on the power of Congress itself. Can it be said that Congress, lacking such power, can confer this power upon a territorial legislature? If indeed it may, can such power be granted by the inclusion of a blanket authority under the wording "rightful subjects of legislation"?

## CONCLUSION

The questions involved in this case concern the fundamental legislative power of the Government of the Virgin Islands and are of the greatest importance to this developing area. It is submitted that they are of such importance to the future of the Virgin Islands as to warrant this Court's attention and guidance.

Respectfully submitted,

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